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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

VALERIE D. WATSON-SMITH, AND ALL OTHERS SIMILARLY SITUATED, Plaintiff, vs. SPHERION PACIFIC WORKFORCE, LLC, and DOES 1 through 100, inclusive, Defendants.	No. C07-05774 **PLAINTIFF'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT** **Date: October 3, 2008** **Time: 9:00 a.m.** **Courtroom: 2** **Judge: Honorable Jeffrey S. White**

Plaintiff Valerie Watson-Smith (Plaintiff) respectfully submits this reply memorandum of points and authorities in support of her Motion for Leave to File a First Amended Complaint.

I. INTRODUCTION

Plaintiff's motion before this Court seeks leave to amend her complaint to add a cause of action under the California Labor Code Private Attorneys General Act of 2004 (PAGA) and to

redefine the meal break period class (Class A) set forth in her original complaint. Federal Rule of Civil Procedure 15(a) provides that leave to amend a pleading "should be freely given when justice so requires." The Ninth Circuit instructs that Rule 15 is to be applied with "extreme liberality." Eminence Capital, LLC v. Aspeon, Inc., 326 F.3d 1048, 1052 (9th Cir. 2003). The United States Supreme Court provided the district courts with a list of factors to consider in evaluating whether to grant a party leave to amend its pleading: undue delay, bad faith on the part of the movant, repeated failure to cure deficiencies via previously-allowed amendments, prejudice to the opposing party, or futility of the amendment. Id. at 1051-52 (quoting Foman v. Davis, 371 U.S. 178 (1962)). These factors are not of equal weight: the prejudice that may result to the opposing party is the most important consideration. Id. at 1052. Absent prejudice or a strong showing of any of the remaining Foman factors, the district court should rule in favor of amendment. Id.

Defendant Spherion Pacific Workforce, LLC's (Defendant or Spherion) Opposition to Plaintiff's Motion does not dispute Plaintiff's proposed amendments on the grounds of prejudice, undue delay, or bad faith. Instead, Defendant focuses its argument on futility alone. Defendant's argument claiming that Plaintiff's proposed class definition does not constitute a certifiable class fails for two reasons: 1) Plaintiff's proposed refinements to the class definition are clearly stated and describe ascertainable subclasses; and 2) Defendant's merits argument lacks proof of futility as a basis for denying Plaintiff leave to amend her complaint.

II. ARGUMENT

The standard to deny a party leave to amend based on futility is straightforward. "A proposed amendment is futile only if *no* set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." Miller v. Rykoff-Sexton, 845 F.2d 209, 214 (9th Cir. 2003) (emphasis added). While Defendant argues this is so, Defendant presents no facts establishing this is so. Defendant fails to prove Plaintiff's proposed refinements to the existing class definition meet the futility standard.

A. Defendant's Claim of Futility is Unsupported by its Cited Authority

In its opposition, Defendant states, "if the proposed amendment defines a class that cannot be certified, the amendment is deemed futile." Opp. at 3:19-20. Defendant relies upon two factually inapposite cases to support this statement.

The courts in both Paul v. Winco Foods, Inc., 2007 U.S. Dist. LEXIS 37024 (D. Idaho Feb. 16, 2007) and Luedke v. Delta Airlines, Inc., 1993 U.S. Dist. LEXIS 11002 (S.D.N.Y. Aug. 6, 1993) were considering motions for leave to amend the complaint in a different stage of proceedings than the instant case. Both courts had already evaluated and denied those plaintiffs' respective motions for class certification when considering the proposed amendments. In that specific procedural context, evaluation of the proposed amendments per the requirements of Rule 23 was proper because the courts had previously identified flaws in the existing allegations that the amendments were designed to cure. In contrast, Plaintiff's proposed amendments to the meal period class definition are brought while discovery is ongoing and well before the deadline for filing a motion for class certification.

Moreover, Plaintiff's proposed amendments do not pose the same problems that led the Paul and Luedke courts to deny leave to amend. In Paul, the plaintiffs' proposed amended complaint was "essentially a complete restatement of their previous complaint with the addition of material related to certifying a class" that did not cure the defects the court identified in denying their motion for certification. 2007 U.S. Dist. LEXIS 37024 at *20. In Luedke, the proposed amendments clearly did not resolve the court's concerns regarding class member identification. 1993 U.S. Dist. LEXIS 11002 at *15-17. Again, Plaintiff has yet to request class certification. Plaintiff's proposed redefinition of Class A into two subclasses, based on evidence produced in discovery, seeks to refine and narrow the proposed meal break period class before certification is requested.

B. Plaintiff's Motion To Amend Does Not Require A Class Certification Analysis

Defendant opposes Plaintiff's Motion on the ground that the proposed amended definition of Class A, with the addition of the subclasses, is not amenable to class treatment. As Plaintiff has

brought a motion for leave to file a First Amended Complaint, not for class certification, this analysis is not necessary given that Plaintiff has met the standards of Rule 15(a). Other district courts have taken the position that arguments like Defendant's are more appropriately addressed in the context of class certification, not in opposition to a motion for leave to amend a complaint. Academy of Ambulatory Foot Surgery v. The American Podiatric Association, 516 F. Supp. 378, 383 (S.D.N.Y. May 15, 1981) (court granted plaintiffs leave to amend complaint over defendant's futility argument grounded in class certification).

Defendant's reliance upon the holding in Brinker v. Superior Court, 2008 Cal.App. LEXIS 1138 (Cal.App.4th Dist. July 22, 2008) to establish futility is misplaced for several reasons. First, Brinker did not hold that meal period claims arising under California law can never be certified as class claims. Second, while Defendant argues that …plaintiff does not rely on any alleged class-wide policy…' regarding meal periods to support a request for class certification, Defendant fails to offer evidence this is so.[1] Opp. at 5:9-10. Plaintiff is not required to prove the absence of futility to obtain leave to amend, rather, Defendant must affirmatively prove the absence of any set of facts which could be proven under the amendment sought to constitute a valid claim. This Defendant fails to do.

Defendant claims that Plaintiff's proposed subclasses are both non-ascertainable and non-sensical and that these constitute additional grounds on which Plaintiff's amendment is futile. These contentions are without merit. Plaintiff's class definitions are clearly stated and define two discrete subclasses of Spherion hourly employees. Defendant argues that identification of class members would be a "massive, time-consuming undertaking," but offers no evidence to support

[1] In fact, Plaintiff does seek class certification based upon Spherion meal period policies and practices. Spherion provides temporary employees who work at remote client sites. Spherion does not affirmatively schedule meal periods for such employees, and does not pay an extra hour of compensation when time records of such employees depict the absence of a meal period. Declaration of Daniel H. Qualls Filed In Support of Plaintiff's Motion For Leave To Amend Complaint, ¶ 4, Exhibit C. Following the FRCP 30(b)(6) deposition examinations ordered by Magistrate Brazil, Plaintiff propounded two successive sets of interrogatories and inspection demands seeking additional discovery regarding such policies and practices. Defendant again refused to comply with such discovery, which is now the subject of a second motion to compel to be heard on September 24, 2008, before Magistrate Brazil.

this assertion. Opp. at 6:16-17. Defendant's claim that the definitions are "non-sensical" is similarly unsupported. Argument is not evidence.

The burden of proving futility rests on the party asserting it. Defendant asserts futility, but does not cite to any facts as proof that Plaintiff's proposed subclasses are in fact futile. The core of Defendant's opposition is argument that relies only on case law and unsupported conclusions. Yet, the standard for futility is clear: Defendant must show there is no set of facts that may be proved under the amendment that would constitute a valid claim. Miller, 845 F.2d at 214. "Fact" is the operative term in this standard. Recitations of cases and conclusory statements are not facts. Given Defendant cites no facts in support of its position, Defendant has failed to meet its burden of proof of futility.

Defendant's contention that Plaintiff's proposed class subclass definitions are futile because they rely on a determination on the merits is incorrect. The proposed subclasses are defined as follows:

> Subclass 1
> Persons paid on an hourly basis working on a customer site for whom Spherion electronic time records depict a meal period not taken, and who did not receive a compensation payment by Spherion for the lack of a meal period in said pay period.
>
> Subclass 2
> Persons paid on an hourly basis working on a customer site without the presence of a Spherion supervisor for whom Spherion time records depict a meal period not taken, and who did not receive a compensation payment by Spherion for the lack of a meal period in said pay period.

The proposed subclass consists of persons who did not in fact receive a meal period break and were in fact not paid an additional hour of compensation. The proposed class definition is based upon two basic objective facts which are not tied to a merits determination: the absence of a meal period as depicted on Spherion employee records, and the absence of payment of an additional hour of pay.

C. Plaintiff Meets The Requirement For Granting Leave To Amend Her Complaint

This Court is readily familiar with the analysis that accompanies Rule 15(a). Wixon v. Wyndham Resort Development Corp., 2007 U.S. Dist. LEXIS 80862 (N.D.Cal. October 22, 2007). Plaintiff offers her amendments for a proper purpose. Indeed, Defendant does not dispute that the amendments are timely, offered in good faith, and will not cause Defendant undue prejudice. The language of the proposed subclass definitions is clear and identifies two subclasses. Defendant fails to offer proof that such subclasses cannot be ascertained such that the proposed amendment is futile.

III. CONCLUSION

Accordingly, for the reasons stated, Plaintiff respectfully requests her motion for leave to amend be granted.

DATE: August 13, 2008

QUALLS & WORKMAN, L.L.P.

By: _____
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Attorneys for Plaintiffs